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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

Estate of JOHN SMITH CLARK, Deceased.	2d Civ. No. B289753 (Super. Ct. No. 15PR00377) (Santa Barbara County)
CHRISTINE CAREY, Petitioner and Respondent, v. LINDA MCMILLAN et al., Objectors and Appellants.	

Linda McMillan and Loris Clark (objectors) appeal an order in favor of Christine Carey for $9,538.70 as costs for proving the validity of a will because of McMillan's and Clark's denials of requests for admissions (Code Civ. Proc., § 2033.420) in this probate action.[1] We conclude, among other things, that the trial

[1] All statutory references are to the Code of Civil Procedure.

court did not abuse its discretion in making this order. We affirm.

FACTS

Carey petitioned to probate the will of decedent John Smith Clark. McMillan and Clark filed objections.

Carey served requests for admissions on McMillan and Clark. Request No. 1 asked them to admit that "exhibit A" was a "genuine copy of the Last Will and Testament" of John Smith Clark. Request No. 18 asked them to admit that "John Smith Clark initialed each page" of the will. McMillan and Clark denied both of these requests.

The case went to trial. Carey proved the validity of the will and that the decedent initialed each page. She filed a motion for "a post-trial award of expenses for proving the truthfulness of matters." (§ 2033.420.) Carey claimed that a trial "could have been avoided" but for McMillan's and Clark's denials of requests for admissions. The motion was supported by the declaration of Carey's counsel. It was lengthy and contained multiple exhibits and an extensive list of a variety of services and costs incurred.

In a tentative ruling, the trial court indicated its intention to deny costs for proving the truth of the facts contained in requests for admissions Nos. 1 and 18. It said Carey had not isolated or "segregated" these costs from the costs relating to other issues.

At a hearing on the motion, prior to the trial court rendering its final order, Carey's counsel referred the court to the portion of the counsel's declaration showing costs totaling $9,538.70 for obtaining the services of a "document examiner" to prove the validity of the will. The court departed from its earlier ruling and found these costs were directly related to proving the

truth of the requests for admissions denied by McMillan and Clark. The court entered an order approving these costs.

DISCUSSION

Sufficient Proof of Costs

McMillan and Clark contend the trial court erred by awarding $9,538.70 as costs because there was not "sufficient evidence" to prove Carey incurred these costs. We disagree.

McMillan and Clark note that the trial court initially found Carey had not "segregated" costs for proving the truth of the requests for admissions. At that time the court said it "therefore declines to make an award with respect to these requests for admission."

But as Carey correctly notes, this was a tentative ruling. In its final order after the hearing, the trial court awarded these costs. On appeal, the court's ultimate order is reviewed. The court may properly change its tentative or initial decision when it makes its final order, and its earlier views "may never be used to impeach the order or judgment." (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 591; *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646-647.)

McMillan and Clark contend there was no proof to identify which costs were incurred for proving the truth of the two requests for admissions they denied relating to the signing of the will.

Where a party denies requests for admissions, the adverse party may seek costs for successfully proving the issues that should have been admitted. (§ 2033.420, subd. (a).) The court may deny costs where "[t]he party failing to make the admission had reasonable ground to believe that that party would prevail on the matter." (*Id.*, subd. (b)(3).) "Costs of proof are recoverable

only where the moving party actually proves the matters that are the subject of the requests." (*Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 529.) "This means evidence must be introduced." (*Ibid.*) "Plaintiffs must show they spent the amounts claimed to prove the issues defendants should have admitted." (*Ibid.*) "The requested amounts must be segregated from costs and fees expended to prove other issues." (*Ibid.*)

Carey contends there is specific segregated evidence in the record to support the $9,538.70 cost figure the trial court awarded for services of a document examiner to prove the validity of the will. We agree.

At the hearing Carey's counsel referred the trial court to the attorney declaration supporting the motion. He noted that it showed costs of $1,400 and $8,138.70 for "forensic document examiner, Dr. Linton Mohammed." Those costs totaled $9,538.70. Counsel said those costs "were incurred solely with respect to the proving up and signing of the will."

The trial court agreed. It said, "[I]t is reasonably clear that the testimony of the questioned document examiner was directed to the single issue, the single group of issues around relevant documents. . . . [I]t had a direct bearing on those particular matters. [T]hey weren't directed to anything else but that. I think that those fees are clearly directed." The court said McMillan's and Clark's denials of requests for admissions Nos. 1 and 18 "both address the issue of the genuineness of decedent's signature on the will." Consequently, these specific costs were directly related to the issue raised by the denials of these requests for admissions. McMillan and Clark have not shown that these cost items were not accurate.

Reasonable Grounds to Deny the Requests for Admissions

McMillan and Clark contend they had reasonable grounds to deny requests for admissions Nos. 1 and 18 as they related to the "genuineness" of the will and whether the decedent initialed each page. They claim these were facts "outside of [their] personal knowledge" and they had "reasonable grounds to believe that they would prevail on the issues." They argue no costs should be awarded against them because of their denials.

Where a party "does not provide reasonable grounds for denying" requests for admissions, an award of costs against that party for proving the truth of the denied facts is appropriate. (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 638.) Reasonable grounds "means more than a hope or a roll of the dice." (*Grace v. Mansourian*, *supra*, 240 Cal.App.4th at p. 532.) "[R]equests for admissions are not limited to matters within personal knowledge of the responding party, [consequently,] that party has a duty to make a reasonable investigation of the facts before answering items which do not fall within his personal knowledge." (*Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 273.)

Carey contends the trial court could reasonably infer McMillan and Clark had "no reasonable belief [they] could prevail on [those] issues [at trial]" because they failed to present evidence on those issues.

The determination of whether there were good reasons for the denial is a matter within the trial court's "sound discretion." (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 753.) An appellant challenging the decision must show the "trial court exceeded the bounds of reason." (*Ibid.*) "It is a deferential standard of review that requires us to uphold the trial court's

determination, even if we disagree with it, so long as it is reasonable." (*Ibid.*)

The trial court found McMillan and Clark did not present evidence to support a finding based "upon a reasonable good faith belief of prevailing on" the issue of the "genuineness of decedent's signature on the will." It said they "essentially *abandoned this claim by the time of trial*." (Italics added.) The court said, "[A]n award of reasonable expenses for costs of proof as to these discrete issues are in general appropriate."

" 'Sometimes a party justifiably denies a request for admission based upon the information available at the time of the denial, but later learns of additional facts or acquires information which would have called for the request to be admitted . . . . If such a party thereafter advises . . . that the denial was in error or should be modified, a court should consider this factor in assessing whether there were no good reasons for the denial.' " (*Wimberly v. Derby Cycle Corp.*, *supra*, 56 Cal.App.4th at p. 635.) " 'On the other hand, if a party in such circumstances stands on the denial and *then fails to contest the issue at trial*, a court would be well justified in finding that there had been *no good reasons for the denial*, thus mandating the imposition of sanctions.' " (*Ibid.*, italics added.)

McMillan and Clark produced a record of the post-trial proceedings, but not of the trial and pre-trial proceedings. We consequently must give appropriate deference to the trial court's findings given: 1) its access to the entire record, and 2) its familiarity with the parties and their credibility during the proceedings which are not part of the record. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.) The trial court may consider the trial and pre-trial conduct of the parties who denied

the requests for admissions in determining whether they had a reasonable belief they could prevail. (*Wimberly v. Derby Cycle Corp.*, *supra*, 56 Cal.App.4th at pp. 637-638.)

In Carey's motion for costs, she noted that her requests for admissions were propounded more than one year before trial. Carey said a "subscribing witness" to the will submitted a declaration with the petition to probate the will in 2015. That was one year before McMillan and Clark submitted responses to the requests for admissions, and two years before trial. Carey said that a subscribing witness was deposed before trial, and McMillan and Clark did not produce opposition evidence on the execution issue at trial. Carey also noted that McMillan and Clark appeared in the case in April 2016, responded to the requests for admissions in October, and had six months to initiate discovery before answering the requests. (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 510.)

From our review of the trial court's findings, and the limited record, we conclude McMillan and Clark have not shown the court abused its discretion. (*Null v. City of Los Angeles*, *supra*, 206 Cal.App.3d at p. 1532; see also *Bloxham v. Saldinger, supra*, 228 Cal.App.4th at p. 753.)

The Judicial Estoppel Doctrine

McMillan and Clark note that Carey's counsel initially told the trial court that their services and costs were so intertwined that they were unable to isolate or identify the costs they incurred to prove the validity of the will. But later at an April 5, 2018, hearing, they claimed they were able to identify two cost items incurred to prove that issue. McMillan and Clark contend that because they initially represented that they were unable to

isolate costs, the judicial estoppel doctrine applies and the cost order must be reversed. We disagree.

The judicial estoppel doctrine protects "the integrity of the judicial process." (*Daar & Newman v. VRL International* (2005) 129 Cal.App.4th 482, 491.) It prohibits parties from taking one position which the court accepts and then taking an opposition position to improperly obtain a litigation advantage. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 137.) " '[I]t is designed to prevent litigants from "playing 'fast and loose with the courts.' " (*Haley v. Dow Lewis Motors, Inc*. (1999) 72 Cal.App.4th 497, 509-510.) But " '[a]n inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing.' " (*Ibid.*) " 'Asserting inconsistent positions does not trigger the application of judicial estoppel unless "intentional self-contradiction is . . . used as a means of obtaining unfair advantage." ' " (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1017.) The doctrine does not apply " ' "when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court." ' " (*Ibid*.)

"Many of the decisions which have invoked the doctrine do so when the party sought to be estopped successfully obtained some judicial relief based on a position which that party later seeks to change." (*Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics* (1998) 61 Cal.App.4th 672, 679.)

Here the initial statement about costs and services being intertwined explained why counsel was unable to provide the information the trial court sought in ruling on the cost motion. It was not an affirmative position taken against an opponent, and there was no relief granted for making this statement. At the April 5th hearing, Carey's counsel explained the change of

position and stated it was initially "a pretty impossible task to segregate out costs associated with the prove ups . . . ." But "[t]hese two were ones we *were able to discover* that were clearly identifiable." (Italics added.)

This shows counsel mistakenly believed the costs could not be separately identified, but later discovered two costs they could identify. The judicial estoppel doctrine does not apply to such a mistake. (*Cloud v. Northrop Grumman Corp,*, *supra*, 67 Cal.App.4th at p. 1017.) McMillan and Clark have not shown counsel engaged in "intentional wrongdoing" (*Haley v. Dow Lewis Motors, Inc.*, *supra*, 72 Cal.App.4th at p. 510), acted in bad faith, or was playing "fast and loose" with the court (*id.*, at pp. 509, 511). There is no showing the trial court ever considered counsel's conduct to be deceptive or improper.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

James P. Ballantine for Objectors and Appellants.

Fell, Marking, Abkin, Montgomery, Granet & Raney, LLP, Michael D. Hellman, Clark A. Lammers for Petitioner and Respondent.